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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ADOLPH SUNDBERG, *Appellant*,

vs.

WASHINGTON FISH & OYSTER COMPANY, a corporation, *Appellee*,

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant, Adolph Sundberg, who was the plaintiff in the District Court, received personal injuries consisting of a gunshot wound in the left hand, while aboard the appellee's cannery tender "Commonwealth" in Alaskan waters, en route from Seattle, Washington, to Port Williams, Alaska.

In consequence he commenced this suit. In his complaint he set out two causes of action. Under the first he sought recovery under the Jones Act, U.S.C.A. Title 46, §688, alleging that he was a seaman at the time of the accident, and that his injuries were caused by the negligence of the appellee, Washington Fish &

Oyster Company. Under his second cause of action, presented only as an alternative to the first cause of action in the event that recovery should not be available to him under the Jones Act, he sought recovery for maintenance, wages and cure, according to the rules of the general maritime law, applicable to seamen injured in the service of the ship.

On the trial, when the appellant had rested his case, the appellee moved for a directed verdict and a dismissal upon the ground that the appellant was not in the course of his employment, nor in the service of the ship at the time of the accident, and on the further ground that the evidence did not show negligence on the part of the appellee. These motions were granted and judgment of dismissal of both causes of action was entered (Tr. 46). From this judgment the appellant prosecutes this appeal.

While the facts of the case are relatively simple, there is considerable obscurity as to the details. From the pleadings and the evidence introduced by the appellant it appears without controversy that before going aboard the "Commonwealth" in Seattle, the appellant had been employed by the appellee to fish on shares in one of its boats in Alaska during the 1940 fishing season (Tr. 2, 3, 8, 20). Under this arrangement appellant was to be compensated on the basis of the quantity of fish caught. This employment and compensation would not commence until the appellant had reached the scene of the fishing operations in Alaska. Although the record is somewhat vague on the point, we believe it appears inferentially that the fishing operations in which appellant was to engage

would be on a boat other than the Commonwealth. Certainly there is nothing in the record to indicate that the appellant's services as a fisherman were to be aboard the Commonwealth, and we understand it to be common ground between the parties that such services would be rendered on another boat after appellant arrived in Alaska.

The Commonwealth comes into the picture in this fashion. In order to enter upon his employment, it was necessary for appellant to go to the fishing grounds in Alaska. He could have gone there on one of the regular passenger steamers, at a cost to himself of approximately Fifty Dollars (Tr. 37). Instead he requested and received permission from appellee to make the trip north on the Commonwealth, which was owned and operated by the appellee (Tr. 21, 37). The details as to this arrangement are not made very clear in the record. It appears that the appellant had gone north on a cannery tender belonging to the appellee in the previous year, 1939. Apparently the arrangement in both years was about the same. In any event, the appellant did go aboard the Commonwealth in May, 1940, with the permission of the appellee, and made the trip north on that boat from Seattle to a point near Anchorage, Alaska, where he was removed from the boat by reason of his injuries (Tr. 32).

While aboard the Commonwealth the appellant stood a watch in the engine room and received his board free of charge (Tr. 22). He received no other compensation. Except by way of background to the events which occurred upon the trip, the precise na-

ture of the arrangement under which the appellant went on the Commonwealth is not of any particular moment on this appeal, because the appellee concedes that although the arrangement was very informal and largely for appellant's benefit, nevertheless appellant was a seaman within the meaning of the Jones Act.

Turning to the events upon which appellant seeks to predicate liability, the record becomes more disjointed and incomplete, at least as far as details are concerned. The only testimony on the subject is that of appellant himself. That testimony is unusually brief for a case of this character, and either omits details or gives them in rather ambiguous fashion. It is somewhat difficult to paraphrase the appellant's account of events accurately, but we think that the following fairly analyzes that portion of his testimony concerning the facts upon which he seeks to hold the appellee liable:

Appellant testified that the Commonwealth was about 110 feet long and 28 feet wide; that it carried a deck load which "left very little room on the deck" (Tr. 23, 24). Just how much room this was is not clear. Appellant states, "We could get down one side, but not on the other." And further, "There wasn't any room except just a little passageway on the side" (Tr. 24, 25). It will be observed that this does not give any exact notion of the amount of clear deck space, does not identify which side of the boat had the available passageway, and does not give a very clear picture of the condition of the deck in general.

The appellant in his testimony identifies four other persons as having been aboard the boat. One of these, one Walter Mustola, who was at the wheel at the time that the appellant was injured, is not an actor in any of the events concerning appellant's injuries (Tr. 29). The other three are Captain Christensen, Irving Taylor and Lewis Varner. Irving Taylor's status aboard the boat is not identified in any fashion whatsoever. Likewise, the status of Lewis Varner with relation to the boat was not identified by the appellant on direct testimony, but upon cross examination he stated that he did not think that Varner was on duty at the time of the shooting (Tr. 43). Just what Varner's duties were is in no place touched upon. The appellant testified that Varner and Taylor both had rifles aboard the boat, and so far as can be gathered from the testimony, these men had the guns simply for their own entertainment and purposes (Tr. 25).

The guns were not fired while the boat was traveling in Puget Sound (Tr. 39) but after she had entered Canadian waters Varner did some shooting until the Captain said, "You had better put the guns away while we are in Canadian waters, or we might get into trouble" (Tr. 25). It will be noted that in the testimony the appellant refers only to Varner having his gun while in Canadian waters, but that in describing the language of the Captain he refers to guns in the plural. This is just one of the innumerable instances in which it is difficult to describe fairly what the appellant's testimony was, because of the doubtful implications which arise from the language

used. The appellant does not explain what the Captain meant by the suggestion that "we might get into trouble," but we surmise that he referred to some possible disapproval on the part of the Canadian authorities, quite possibly arising from the fact that at that time the Dominion of Canada, unlike the United States, was at war.

In any event, the boat proceeded to Ketchikan without any further firing of the guns (Tr. 26, 27). She put in at Ketchikan and after leaving there both guns were again brought on deck, apparently by their owners, Varner and Taylor (Tr. 27). The following verbatim testimony gives the appellant's version of the use to which the guns were put at this time:

"Q How many of the guns came on deck then?

A Two.

Q What was done with them?

A Oh, just shooting.

Q From what point on the deck were they fired?

A Mostly from the rail.

Q Were they at anytime fired otherwise than from the rail?

A No, not very much, no. I do not recall seeing anybody shooting clear across the deck; but they would stand inside the deck, possibly four to six feet, and shoot over the rail." (Tr. 27)

The appellant then testified that the Captain was aware that shooting was going on; that "There was quite a bit of shooting at times," but that he wouldn't attempt to estimate the number of shots except to say that several shots were fired a day until he was in-

jured about four days later (Tr. 28). He further testified that he never heard the Captain give any orders not to fire the guns (Tr. 29). On cross examination he testified that shots were fired at targets of different kinds (Tr. 43).

Coming to the actual occurrence of the appellant's injury, appellant states that he was on deck when some sea lions were sighted in the water; that Taylor had never seen any sea lions before, and that appellant called to Taylor, who was below deck, to come up and see the sea lions (Tr. 29). Taylor did come on deck in response to this call, and Varner came also, although appellant says that he did not know this until after he was shot. Varner brought his gun with him (Tr. 29, 32). As to Taylor, the appellant says that he did not know whether he also brought his gun or not (Tr. 39, 40, 41). This is an amazing piece of testimony inasmuch as the appellant states that he took a position right behind Taylor and proceeded to point out the sea lions to him. It is impossible to believe, under the circumstances, that appellant could be in doubt as to whether Taylor had his gun or not. The exact location in which the appellant and Taylor were standing is not made precisely clear by the appellant's testimony. On direct examination he said that Taylor came up the companionway and "got into one of these—well, one of these wide boards across the deck, and I stood right behind him on some of these box boards" (Tr. 29). On cross examination appellant testified that he was standing almost amidships, about twelve feet or so from the rail, and that Taylor was standing "in the skiff—about the middle

of the skiffs," and that appellant was directly behind him (Tr. 41).

We shall not attempt to solve this somewhat confused account as to just where the appellant and Taylor were. Wherever they were, the appellant says that the sea lions were on the starboard side and the boat was passing them so that they were getting behind the cabin. Then another sea lion came up over to the starboard, and the appellant extended his hand and pointed this sea lion out to Taylor. At the same moment Varner fired his gun, the bullets striking appellant in his extended left hand (Tr. 29).

These are the facts upon which appellant sought to make out his case.

It should be observed that there is no suggestion that Varner, at the time of the shooting, was acting in the course of any employment on behalf of the appellee, and no claim is predicated upon his negligence, assuming that he was negligent. Rather the entire claim of negligence is based upon the contention that the Captain should not have permitted the guns to be shot from the ship. There is no contention that the Captain had any opportunity to prevent the shooting on the particular occasion when the appellant was injured. Rather appellant's position seems to be that the Captain should have issued a blanket order against the firing of the guns. The appellant does rely to some extent on a statement made by the Captain to him after he was injured. This statement, on analysis, is most non-committal. The Captain is asserted to have said: "So you got it. That is too bad. I knew I should have told the boys about those guns;

but you know how it is. I hated to do anything" (Tr. 31, 32).

The remainder of the testimony goes simply to the question of damages. We are not concerned with that question, or the testimony relative thereto, on this appeal, inasmuch as the only question is whether the appellant had made out a case of liability at the time when appellee's motion to dismiss was interposed at the close of appellant's case.

ARGUMENT

GENERAL PRINCIPLES INVOLVED

The general principles of law applicable to this action are no doubt well known to this Court, but for the sake of convenience can be briefly summarized. In order to be entitled to recover on the first cause of action, under the Jones Act, the appellant must show:

(1) That he was injured while "in the course of his employment as a seaman."

(2) That such injury was occasioned by the negligence of the appellee.

The appellant in his brief has devoted considerable space to sustain the proposition that he was a seaman within the meaning of the Jones Act. The appellee does not question that appellant was a seaman under the construction given to that word by the courts under the Jones Act. The appellee does, however, maintain that at the time of his injury appellant was not in the course of his employment and, further, there

was no showing of negligence upon the part of the appellee in causing the injuries which the appellant sustained.

In order to recover on the second cause of action, under the general maritime law, it was necessary for the appellant to show that he was injured while "in the service of the ship." Negligence or fault upon the part of the appellee is in no way essential to the maintenance of this cause of action. Consequently the appellee, as to this cause of action, contends only that appellant was not "in the service of the ship" at the time when he sustained the injuries.

THERE WAS A COMPLETE FAILURE OF PROOF UPON THE ISSUE OF NEGLIGENCE, AND CONSEQUENTLY THE FIRST CAUSE OF ACTION WAS PROPERLY DISMISSED

The appellant's case upon the first cause of action, under the Jones Act, is predicated on negligence, which he must prove, and negligence is to be determined by the usual common law standards.

This Court, in *De Zon v. American President Lines, Limited*, 129 F.(2d) 404, at page 407, said:

> "* * * but we must also be mindful of the fact that although the Jones Act has given 'a cause of action to the seaman who has suffered personal injury through the negligence of his employer' (287 U.S. 372, 53 S. Ct. 174, 77 L. ed. 368), still it does not make that negligence which was not negligence before, does not make the employer responsible for acts or things which do not constitute a breach of duty. 'A seaman is not entitled to compensation or indemnity in the way

of consequential damages for disabilities or efects occasioned by the sickness or injury, except in case of negligence.' 24 R.C.L. §218, p. 1164."

And the Circuit Court of Appeals for the Sixth Circuit, in *Pittsburgh S. S. Co. v. Palo*, 64 F.(2d) 198, announced the same rule in the following language:

"But conceding that the risk of injury was not assumed in the present case, all the authorities seemingly proceed upon the hypothesis that, in order to maintain an action under this section, negligence (as defined by the common law) must be shown. Cf. *Panama R. R. v. Vasquez*, 271 U.S. 557, 559, 46 S. Ct. 596, 70 L. ed. 1085; *Baltimore S. S. Co. v. Phillips*, 274 U.S. 316, 324, 47 S. Ct. 600, 71 L. ed. 1069; *Lindgren v. United States*, 281 U.S. 38, 46, 50 S. Ct. 207, 74 L. ed. 686. The shipowner is not an insurer of the safety of his seamen, and the burden of establishing negligence rests upon plaintiff. *Burton v. Greig*, 271 F. 271 (C.C.A. 5)." (p. 200)

The same governing general principles are announced by the Supreme Court of the State of Washington in *Finnemore v. Alaska Steamship Co.*, 13 Wn. (2d) 276, 124 P.(2d) 956, in the following language:

"This action was brought under the Jones Act, Title 46 U.S.C.A. §688, which provides in part that any seaman who shall suffer personal injury in the course of his employment may, at his option, maintain an action for damages at law for such injury. In order to maintain an action for damages under this section, negligence must be shown, and the burden of establishing such negligence rests upon the plaintiff. *Pittsburgh S. S. Co. v. Palo*, 6 Cir., 64 F.(2d) 198;

The Richelieu, D.C., 27 F.(2d) 960, 1928 A.M.C. 1143, at pages 1164, 1165." (p. 959)

An examination of the record in this case clearly reveals that the appellant has not sustained the burden of proving negligence essential to his recovery. He asserts that negligence is established by the fact that the Captain of the ship had on several occasions prior to the accident permitted the owners of the guns to shoot them from a point at or near the rail, at objects out to sea. The appellant did not offer any evidence which would even remotely suggest that any of the shooting which the Captain permitted was ever conducted in a careless or negligent manner prior to the accident. On the contrary, insofar as he has been at all specific, his evidence would indicate that the shooting was carefully conducted on such occasions.

In order to warrant a finding of negligence under the evidence in the case, the Court would have to say that the simple fact of granting permission to shoot under any circumstances would constitute negligence upon the part of the Captain. Certainly no rule of such broad import and implications is tenable. The mere fact that the Captain permitted guns to be shot is in no way indicative of carelessness on his part. On the contrary, it is impossible to imagine any safer place for the firing of guns than from the rail of the ship, with the bullets directed out to the open sea. Certainly such a practice suggests no reasonable likelihood of peril to anyone who is on board the ship. In order to make out a case of negligence on the part of the Captain the appellant of necessity had to show some circumstances which would indicate to a reason-

able person that the practice indulged in would have the probable effect of causing injury to someone aboard the ship.

It is no doubt unnecessary to remind this Court that the classic and standard definition of negligence is that it consists of the failure to exercise such care as a reasonably prudent person would exercise under the same or similar circumstances. Thus one of the absolute essentials for determining whether negligence exists in a particular case involves an examination into what the attendant circumstances were. Here we have practically no details at all as to surrounding circumstances. We have only the bare fact that the Captain had not objected to the men shooting in a manner which appears to have been entirely safe to all concerned. There is no evidence showing that a course of action which might be entirely safe was in fact dangerous.

We are certain that no court would be willing to adopt the rule that a person is negligent simply because he had a right to control the use of a gun by another, and that a third person was shot by reason of the negligence of the person who had possession of the gun. The implications of such a rule would be startling to say the least. If, for example, the owner of a gun were to hand it to another with permission to shoot it at a target situated in a spot clearly safe for that purpose, and the person to whom the gun was then entrusted should, without any previous warning, proceed to shoot a bystander as a result of negligent handling of the gun, in a manner entirely otherwise than for which it was entrusted to him, certainly the

owner of the gun would not be liable. The facts here are not essentially different. The Captain, as a reasonable person, could not have anticipated, when he simply permitted the men to shoot from the rail, that at some later time one of them would suddenly rush on deck with his rifle, in response to call from the appellant that sea lions had been sighted, and would then suddenly and carelessly shoot the appellant in the manner which he has described.

Not only does the evidence not warrant any finding of negligence, but it clearly appears that the acquiescence of the Captain in the earlier target shooting was not the proximate cause of the accident. Rather the appellant's injuries arose out of an entirely new type of situation—shooting at sea lions—which arose on the spur of the moment, and which the Captain had, for all that appears in the record, neither time nor opportunity to prevent. The situation is thus exactly as though the Captain had permitted the men, on a number of previous occasions, to engage in a game intrinsically harmless, and then suddenly, on a later occasion, one man should depart from the normal course of the game and suddenly commit an assault on another. The permission to do that which was in and of itself harmless could not be the proximate cause of the injury occasioned by a departure from the course permitted.

We do not wish to belabor a point that seems to us so clearly unanswerable. This Court is confronted by a record which the appellant made. The burden was on him to prove negligence. He brought before the Court a most meager statement of the circum-

stances, and the consequent deficiency of his proof defeats his recovery. Much as we sympathize with the appellant for the injuries which he sustained, he is not entitled to recover for those injuries under the Jones Act, unless he proves that they were proximately caused by the negligence of the appellee, which he has not done.

There is a dearth of decisions upon facts closely similar to those involved in this case. Undoubtedly like situations have existed before, and the very absence of reported decisions suggests that injured persons have recognized the impossibility of fixing liability upon evidence so general and so flimsy. There are, however, innumerable decisions which recognize the necessity of the injured person proving some facts from which carelessness could reasonably be inferred. The following cases of this character are sufficiently parallel with the facts in the case at bar to sustain the appellee's position:

In *Pittsburgh S. S. Co. v. Palo, supra*, 64 F.(2d) 198, the Circuit Court of Appeals for the Sixth Circuit held that there was a failure of proof of negligence. In that case the plaintiff maintained that the shipowner was negligent in that it furnished defective appliances. In arriving at his decision the Court said:

> "But we think that the court committed a more fundamental error in not directing a verdict for the defendant for want of substantial evidence of negligence in respect of both causes of action. In neither were facts shown which should lead the defendant to anticipate the danger of injury to its seamen by virtue of the existing condition of the ship's appliances. Whether or not the fact

that injury of some sort might reasonably have been foreseen bears a proper part in the application of the doctrine of proximate cause (see *Johnson v. Kosmos Portland Cement Co.* (C.C. A.) 64 F.(2d) 193, and *Smith v. Lampe* (C.C. A.) 64 F.(2d) 201, decided at this session), *it is now firmly established that no act or omission may be considered negligent unless the danger of injury was reasonably foreseeable.* In *Lincoln Gas & Electric Co. v. Thomas*, 74 Neb. 257, 260, 104 N.W. 153, 154, the court thus expressed the same thought: 'It is of the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of omission or commission as might, within the domain of probability, cause some such an injury as that complained of.' In *Hope v. Fall Brook Coal Co.*, 3 App. Div. 70, 75, 38 N.Y. S. 1040, 1043, the court says: 'The circumstances necessary to be known before the liability for the consequence of an act or omission will be imposed must be such as would lead a prudent man to apprehend danger.' See, also *Burton v. Greig, supra; Waters-Pierce Oil Co. v. Van Eldren*, 137 F. 557 (C.C.A. 8); *Carey v. Baxter*, 201 Mass. 522, 525, 87 N.E. 901; *Stedman v. O'Neil*, 82 Conn. 199, 72 A. 923, 22 L.R.A. (N.S.) 1229; *Wickert v. Wisconsin Central R. Co.*, 142 Wis. 375, 125 N.W. 943, 20 Ann. Cas. 452. *In view of these decisions, and many others, it is not sufficient to show simply that a defect existed; the defect must be of such nature that the defendant should reasonably have apprehended the danger of injury.*" (p. 200) (Italics ours)

In *Birks v. United Fruit Company, Inc.*, a decision of the District Court for the Southern District of New

York, reported in 48 F.(2d) 656, the plaintiff's complaint was dismissed on the ground that it did not state a cause of action. It alleged that the plaintiff had been assaulted by other members of the crew who had felonious and criminal propensities. In holding this to be an insufficient allegation of negligence the Court said:

> "The allegation that members of the crew had felonious and criminal propensities does not sustain a cause of action in negligence in the absence of an allegation that the defendant knew of these propensities or had knowledge of facts putting it on notice. See *The Rolph* (C.C.A.) 299 F. 52, certiorari denied 266 U.S. 614, 45 S. Ct. 96, 69 L. ed. 468." (p. 657)

Wilcox v. United States, 32 F. Supp. 947, a decision of the District Court for the Southern District of New York, likewise involved an assault by other members of the crew. The facts were that the persons who committed the assault had been drinking and had tried to prevail upon the rest of the crew to postpone the sailing of the ship. When the others, including the plaintiff, insisted upon commencing the voyage, the assault occurred. The master knew that the crew had been arguing on this subject. It was contended that he was negligent in permitting the persons who committed the assault to remain at large. In denying that this constituted negligence, the Court said:

> "Was the master negligent in allowing Byrne and Collins to remain at large? That is the only issue in the case, and the answer depends on whether the master should reasonably have an-

ticipated that Byrne and Collins would inflict bodily injury on any of the crew. Byrne and Collins had done nothing previously to indicate that they were vicious characters. They had concededly been drinking, but were not drunk, and knew fully what they were about. There is no evidence, either, that during the discussion in the messroom they made any threats against other members of the crew."

* * * * * * *

"The libellants lay considerable stress on the testimony that the master said he would 'guarantee' the safety of the men, and 'protect' them in their work. The master denied that he made any such statement, and I am inclined to accept his testimony. But even if these statements were made, I do not believe that they are sufficient to charge the master with knowledge that Byrne and Collins were vicious characters who should have been restrained. I think, therefore, that on the whole case the charge of negligence has not been proved." (p. 949)

In *Finnemore v. Alaska Steamship Company, supra,* 13 Wn.(2d) 276, 124 P.(2d) 956, the Court quoted with approval from *Pittsburg Steamship Co. v. Palo, supra,* 64 F.(2d) 198. As a preliminary to the quotation the Washington court said:

"It is also the well established rule that no act or omission of the shipowner may be considered negligent unless the danger of injury was reasonably foreseeable."

After quoting from the *Pittsburgh Steamship Company* case the Court refers to and quotes from a considerable number of decisions from other jurisdic-

tions. All of these quotations are to the same effect, and the various courts in forceful language point out the necessity of some proof that would reasonably put the party charged with negligence upon warning of the fact that the consequences which occurred were probable under the circumstances.

In *O'Brien v. Calmar Steamship Corp.*, 104 F.(2d) 148, the Circuit Court for the Second Circuit held that there was no negligence where it appeared that the plaintiff had fallen by reason of stepping on a piece of pipe, there being no proof as to how long the pipe had been there, or of the fact that the defendant or its agents should have known that it was present.

The principles which these cases announce are so fundamental that an extension of citations would simply be tedious. They demonstrate the rule for which the appellee contends, namely, that proof of negligence in this case was entirely insufficient.

The firearms cases cited by the appellant in his brief are in no sense contrary. As a matter of fact, they support the very position which the appellee takes here. In every one of those cases something more than the mere fact of shooting or permission to shoot was shown. Most of these cases, for example, deal with injuries sustained in shooting galleries maintained in places of amusement, where a large number of persons congregate. On the face of things the shooting of guns in such surroundings is manifestly dangerous unless conducted with extreme care. The situation in places where large numbers of persons congregate is in no way comparable to the facts

which exist in this case. Furthermore, in these cases, the plaintiff in every instance showed some further facts warranting a finding of negligence.

Thus, in *Szesz v. Joyland Company* (Cal.) 257 Pac. 871, the plaintiff was injured when a bullet fired in a shooting gallery glanced back from a complicated metal background into which it was fired and struck the plaintiff while he was standing behind the person who had fired the gun.

In *Larson v. Calder's Park Co.*, 54 Utah 325, 180 Pac. 599, it appeared that the walls of the shooting gallery were full of holes and that the bullet which struck the plaintiff, who was passing along a pathway by the side of the shooting gallery, passed through one of these holes in the course of its flight.

In *Thornton v. Maine State Agricultural Society*, 97 Me. 108, 53 Atl. 979, the bullet went through the rear wall of the shooting gallery and hit the plaintiff, who was on the other side.

In *Olson v. Hemsley*, 40 N.D. 779, 187 N.W. 147, the defendant was shown to have left a loaded gun lying around where he could reasonably have expected it to come into the possession of a young boy, who was known to be careless.

In each of these cases, as well as all of the others cited by the appellant, the special facts shown did present an issue of fact upon the question of negligence.

We do not for a moment question that if one person, having the power to govern the actions of another, permits the other to shoot a gun *under circum-*

stances where he has reason to believe that the gun will be handled in a reckless manner, he will be liable for the consequences which he should have foreseen. The distinction between the cases to which that rule applies and the present case rests on the fact that there is some evidence of special conditions upon which to base a finding of negligence, which is not to be found in the record in this case.

We wish to point out that the appellant does not in his brief maintain that the appellee can be held liable because of the negligence of Varner, the man who did the shooting. Were he to do so, such a contention would be untenable because there is nothing in the record to indicate that at the time when the shooting occurred Varner was acting in the course of any employment for the appellee. As a matter of fact, the record is entirely barren as to the nature of the relationship existing between Varner and the appellee, and furnishes no basis for holding the appellee liable by virtue of any act or omission upon Varner's part. It is well established under the decisions that where it is sought to hold a shipowner liable for negligence on the part of one of the shipowner's employees, it must appear that the employee was at the time acting within the course of his employment.

Rourange v. Colombian S. S. Co., Inc., 5 N.Y.S.(2d) 537, affirmed by Court of Appeals of New York, 20 N.E.(2d) 28;

Panama Railroad Co. v. Johnson, 264 U.S. 375;

Sibley v. Barber S. S. Lines (Dist. C. S.D., N.Y.) 57 F.(2d) 318;

In re Southern Pacific Co. (Dist. C. S.D. N.Y.) 30 F.(2d) 723;

Nelson v. American West African Line, Inc. (C.C.A. 2) 86 F.(2d) 730;

Lyke Bros. S. S. Co. v. Goubaugh (C.C.A. 5) 128 Fed. 387.

THE EVIDENCE SHOWS THAT THE APPELLANT WAS NOT ACTING IN THE COURSE OF HIS EMPLOYMENT AT THE TIME HE RECEIVED HIS INJURY, AND CONSEQUENTLY THE FIRST CAUSE OF ACTION WAS PROPERLY DISMISSED

The remedy afforded to an injured seaman under the Jones Act exists only when the injury occurred in the course of the seaman's employment. The exact language of the Act is as follows:

> "Any seaman who shall suffer personal injury *in the course of his employment* may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Italics ours)

So far as we have been able to ascertain, there is no decision construing and applying this phrase under the Jones Act upon facts like those in the case now before this Court.

It is true that the courts have held that a seaman is engaged in the course of his employment while resting in the sleeping quarters provided upon the ship (*McCall v. Inter-Harbor Navigation Co.* (Ore.) 59 P.(2d) 697); in going to get a drink of water while off duty (*Holm v. Cities Service Transportation Co.* (C.C.A. 2) 60 F.(2d) 721; and while leaving the ship on being told that his services will not for the time being be required (*Wong Bar v. Suburban Petroleum Transport, Inc.* (C.C.A. 2) 119 Fed. 745). All of these instances, however, involve cases in which the injured seaman is doing something incidental and reasonably necessary to his employment. In no case of which we are aware has liability been upheld where the seaman was doing something not necessarily incident to his employment, but of interest solely to himself.

Clearly Congress, by including the words "in the course of his employment" in the statute as a condition to the right of recovery, meant to exclude certain cases from the field of liability. If Congress had meant to authorize the seaman to maintain an action for any injury sustained in consequence of the negligence of the shipowner while the seaman was on board ship, it would no doubt have said so in the statute. By using the words "in the course of his employment" it clearly contemplated that the new remedy accorded by the Jones Act should not be available unless the

injury occurred to the seaman while actually performing his work or doing some act necessarily incident thereto.

In ascertaining the Congressional intention certain underlying facts must be kept in mind. Under the general maritime law, at the time the Jones Act was adopted, the seaman possessed a right of action for his wages, maintenance and cure, and this right of recovery was in no way dependent upon proof of the shipowner's negligence. In addition, under the general maritime law, the seaman had a right of action to recover for personal injuries if the ship were unseaworthy. Prior to the adoption of the Jones Act the seaman had no right to sue the shipowner for compensation for injuries other than the two rights of action above mentioned. *The Osceola*, 189 U.S. 158, 23 S. Ct. 483, 47 L. ed. 760. The right to sue under the Jones Act derives its vitality and existence from the statute only. It seems clear that Congress intended to limit this right and leave the sailor who could not bring himself within the terms of the Jones Act, as so limited, to the prosecution of one or other of the actions available to him under the general maritime law.

In the present case there can be no doubt that the appellant was not engaged "in the course of his employment" unless that phrase is held to be utterly without meaning, or given such an extremely liberal construction as to include virtually anything that the seaman does while aboard ship. The pointing out of sea lions to other persons on board the boat does not, by the remotest stretch of the imagination, fall with-

in the purview of any duties of the appellant. The only positive duties which he claims to have had aboard the ship were to stand a watch in the engine room. Incidental to that duty he no doubt would, under the decisions, remain in the course of his employment while resting in his bunk or eating his meals, or doing any other act reasonably required to fit himself to discharge his expressed duties in the engine room. When, however, he departed from this field into a line of activity of interest and concern only to himself, he was no longer engaged in the course of his employment, and if injured at such a time, he cannot bring himself within the scope of the statute.

The phrase "in the course of his employment" has received judicial interpretation on innumerable occasions in cases arising outside of the Jones Act. For the most part these cases fall into two categories. The first is that class of case in which a third person seeks to hold the master liable for injuries occasioned by the act or omission of the servant under the doctrine of *respondeat superior*. The second is the line of cases under which an injured servant seeks recovery for personal injuries under Workmen's Compensation Laws. This latter class of authority is especially apt here, because the broad considerations of public policy which underlie Workmen's Compensation Laws require a liberal construction in favor of the servant. Nevertheless, in determining the rights of injured employees under these laws, the courts have held that the phrase "in the course of his employment" comprehends only those activities of the workman which further the business of the

master. This is the same rule as that laid down in the *respondeat superior* cases. The following are typical of decisions holding that an employee doing something of personal interest to himself is not in the course of his employment under Workmen's Compensation Statutes.

Hill v. Department of Labor and Industtries, 173 Wash. 575, 24 P.(2d) 95;

Beamer v. Stanley Company of America, 295 Pa. 545, 145 Atl. 675;

Torrey v. Industrial Accident Commission of State of California, 132 Cal. App. 303, 22 P.(2d) 525;

Kinkead v. Management & Engineering Corporation (Mo. App.) 103 S.W.(2d) 545;

U. S. Fidelity & Guaranty Co. v. Industrial Commission, 43 Ariz. 305, 30 P.(2d) 846;

Stornelli v. Duluth etc. Ry. Co., 193 Mich. 674, 160 N.W. 415.

Of the foregoing decisions, the decision of the Supreme Court of Washington in the *Hill* case contains the most complete discussion of the rule.

There is nothing novel in denying the employee a right to recover under the statute which creates his cause of action, when he cannot bring himself within the terms of the statute. Precisely the same situation obtains under the Federal Employers Liability Act, governing the rights of railroad employees. The situation under that Act is especially persuasive in cases under the Jones Act because the latter Act incorporates certain procedural provisions of the Fed-

eral Employers Liability Act, and in broad outline the two Acts are similar in purpose. Under the Federal Employers Liability Act, 45 U.S.C.A. §51, an employee is given the right to recover if injured "while he is employed by such carrier in such commerce." It will be seen that the qualification here is not expressed in the words "in the course of his employment," but rather while employed "in such commerce," the word "such" having reference to interstate commerce, previously mentioned in the section.

Courts have on numerous occasions held that railroad employees who have received injuries, but who were not at the time engaged in interstate commerce, are not entitled to recover under the Act. Typical of these cases are *Illinois Central Ry. v. Archer* (Miss.) 74 So. 135; *Illinois Central Ry. Co. v. Behrens*, 233 U.S. 473, 34 S. Ct. 646, 58 L. ed. 1051; *McBain v. N. P. Ry. Co.* (Mont.) 160 Pac. 654; *Elliott v. Paine* (Mo.) 239 S.W. 851; *Hobbs v. Great Northern Ry.*, 80 Wash. 678, 142 Pac. 20.

If an employee of an interstate railroad, injured by the negligence of the railroad, is not entitled to recover under the Federal Employers Liability Act because he cannot bring himself within the terms of the Act by showing that he was engaged in interstate commerce at the time of his injury, it is equally proper to construe the Jones Act to deny recovery to a seaman who likewise cannot bring himself within the terms of that Act by showing that he is within the requirement of being within the course of his employment.

We have already adverted to the fact that the words

"in the course of his employment" must have been inserted in the Act for a purpose. If they can be extended to cover the facts of the present case, they can be equally extended to cover virtually anything that a seaman would be doing while on board the ship. Any interpretation so broad would in fact write the words entirely out of the statute.

It is the appellee's position that the Jones Act contemplates that an employee shall recover only when he can show that he was doing the thing which he was employed to do, or something necessary or incidental to that thing, and that when he is engaged in an enterprise simply for his own entertainment, he cannot maintain an action for injuries under the Act, but is remitted to seek redress under the general maritime law, if that redress be available to him.

THE APPELLANT IS NOT ENTITLED TO MAINTENANCE, WAGES AND CURE BECAUSE HE WAS NOT IN THE SERVICE OF THE SHIP AT THE TIME WHEN HE RECEIVED HIS INJURIES

As will appear from the cases hereinafter cited, a seaman, in order to recover under the general maritime law for his maintenance, cure and wages, is required to show that his injury was sustained "in the service of the ship." As matters stood at the time when this case was tried and decided in the District Court there appeared to be no doubt that the appellant was not entitled to recover under the law as announced prior to that time. This was especially true in the Ninth Circuit under the decision of *Meyer v. Dollar Steamship Line*, 49 F.(2d) 1002. In that case

the meaning of the phrase "in service of the ship" was explored in some detail and it was held that a seaman injured while engaged in some activity of interest only to himself, could not hold the shipowner liable for his wages, maintenance and cure. However, since the trial of this case, the Supreme Court of the United States on April 19, 1943, decided the cases of *Aguilar v. Standard Oil Company of New Jersey*, and *Waterman Steamship Corporation v. Jones*, both dealt with in a single opinion appearing in 63 S. Ct. 930.

In view of the fact that these cases were decided nearly a month before appellant's brief was served, that appellant's counsel was then apparently unaware of their existence, and that appellant's brief advances virtually no argument in support of his contention that he is entitled to wages, maintenance and cure, it rather pains the authors of this brief to be put in a position of bringing these cases up for discussion. However, as members of the bar of this Court, they feel that they would be derelict in their duty if they did not call attention to these decisions.

In these two cases the Supreme Court of the United States extended the meaning of the phrase "in the service of the ship" far beyond what had previously been accepted as the legitimate definition of the phrase. In both of the cases mentioned seaman were injured while on shore leave. In both instances the Supreme Court held that they were in the service of the ship and consequently entitled to wages, maintenance and cure.

The reasoning of the decisions can be best gather-

ed from the opinion, but in substance the Court held that shore leave was a necessary incident to the employment of a seaman, and further held that in view of the fact that the right to wages, maintenance and cure is based upon broad grounds of policy, the phrase should be liberally construed. The Court, however, mentions repeatedly an exception to the rule which will deprive the seaman of the right to recover if guilty of disqualifying conduct. The decisions do not define the limits of the phrase "disqualifying misconduct." If by this phrase it is meant to deprive the seaman of his right to recover only in those instances where he is guilty of misconduct involving some element of moral turpitude, it might appear that the appellant here has a right to recover. After mature consideration, however, we do not believe that the phrase was intended to be so limited. The theory of the *Aguilar* and the *Waterman* cases, as we understand them, is that the right to recover maintenance, wages and cure exists so long as the employee is doing something reasonably necessary to his employment. The moment he departs from that field and does something that can be of no interest to the employer at all, but solely of personal interest to himself, there is no reason why he should be entitled to compensation from the employer.

In a literal sense it is perhaps somewhat harsh to define the conduct of the appellant here, under the present state of the record, as misconduct. In so branding it we do not particularly mean to use that word in any opprobrious sense. It must be kept in mind

that the Supreme Court, in using the phrase, was not considering any detailed instance to which it must apply, but rather made the observation generally in a case in which it had held, as a basic proposition, that the employee was doing something incidental to his work. The Supreme Court had no occasion to define the phrase in detail. We think that when the reasoning of the *Aguilar* and *Waterman* cases is closely scrutinized there is still room for the contention that the appellant has no case under his second cause of action here. This matter, coming before the Court so closely after the decisions of the Supreme Court of the United States in the *Aguilar* and *Waterman* cases, there is naturally no further judicial definition of the limits of the phrase "disqualifying misconduct," and the matter is thus squarely put up to this Court for its own determination on that question.

The appellee most positively takes the position that the *Aguilar* and *Waterman* cases have no bearing upon any question arising under appellant's first cause of action under the Jones Act. Not only are the phrases "in the service of the ship" and "in the course of his employment" different in form, but the basic considerations which go to the interpretation of the two phrases are entirely different. Utterly different considerations control in determining the right of a seaman to recover under the general maritime law, where the shipowner is to a large extent made an insurer of his safety, than exist under the Jones Act, which creates a new remedy based on accepted principles of tort liability only. In the for-

mer case the courts are naturally disposed to be more generous in their interpretations than in the latter.

At most the *Aguilar* and *Waterman* cases can affect only the appellant's second cause of action. As previously stated, we do not believe that the theory and reasoning of those cases are sufficient to warrant a reversal even as to that cause of action.

CONCLUSION

Viewed objectively, the appellant's action at best rests on an extremely weak foundation. Only by grace of a most liberal interpretation can he be said to be a seaman in the commonly accepted sense of that term. Only by giving him the benefit of all the doubt can the story that he told on the witness stand be given full credence, in view of his testimony that he does not know whether Taylor had a gun at the time when the shooting occurred. In other respects his account of the facts leaves much to imagination and speculation.

From whatever angle the case is viewed, the justice of the appellant's demand for compensation is open to the gravest doubt. Without, however, relying on such generalities, we submit that much as we sympathize with appellant's misfortune in receiving his injuries, he cannot hold another party responsible for those injuries without proving, as to his first cause of action under the Jones Act, that the appellee was negligent, and that the appellant was in the course of his employment; and as to his second cause of action for

maintenance, wages and cure, that he was in the service of the ship at the time he was injured. In all sincerity we believe that he has not made out a case under either cause of action.

Respectfully submitted,

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